

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLAUDIA MORRIS)	
Claimant)	
)	
VS.)	
)	
USD 259)	
Self-Insured Respondent)	Docket No. 1,002,640

ORDER

Claimant requested review of the December 23, 2003 Award by Administrative Law Judge Jon L. Frobish. The Appeals Board (Board) heard oral argument on June 15, 2004.

APPEARANCES

Randy S. Stalcup, of Wichita, Kansas, appeared for the claimant. Gary K. Albin, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument, the parties acknowledged that average weekly wage was no longer an issue.

ISSUES

The ALJ found that claimant sustained no permanent impairment as a result of her December 10, 2001 accident when she fell from a chair while retrieving some boxes while at work. Judge Frobish made this finding after weighing the medical testimony of Drs. Philip R. Mills, Frederick R. Smith, Paul S. Stein and Daniel D. Zimmerman.

The claimant requests review of this determination alleging that she is entitled to a 10 percent whole body permanent impairment as a result of her work-related injury.

Claimant maintains Dr. Zimmerman's opinions are more persuasive than those offered by the other physicians.

Respondent argues the ALJ's conclusions and Award are appropriately supported by the evidence contained within the record and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

The underlying facts of the accident are not in dispute and were adequately summarized in the Award. Thus, they will not be unnecessarily repeated herein except as to explain the Board's decision.

Following her compensable injury, claimant was provided treatment with Dr. Mark Dobyns. Following an examination which included x-rays, claimant was allowed to return to work with no restrictions, although she was complaining of lingering hip and low back pain. Claimant returned to see Dr. Dobyns on January 9, 2002 and reported that she was feeling better. There was no indication of weakness or radiculopathy in either lower extremity. Dr. Dobyns did, however, offer her physical therapy to address her lingering left hip pain.

Dr. Dobyns saw claimant again on February 13, 2002. During this visit claimant indicated she had significant pain in her lower back. Dr. Dobyns ordered an MRI which proved to be unremarkable. He then released her to limited duty at work and recommended she be seen by Dr. Frederick Smith.

On February 28, 2002, Dr. Smith examined claimant and ordered a bone scan. This test was interpreted normal. Dr. Smith ultimately concluded he could not find "any good objective findings" that would account for claimant's increasing subjective complaints.¹ Dr. Smith saw claimant again on May 10, 2002. At this point he indicated he could find no physical reason for claimant's subjective complaints of pain.² Dr. Smith expressed the opinion that "[w]hatever is going on has nothing to do with her work injury."³ Rather, he concluded any findings of degenerative changes in claimant's lumbar spine were attributable to the natural aging process and were not related to her work activities or work

¹ Smith Depo. at 8.

² *Id.* at 10; Ex. 2 at 8.

³ *Id.* at 11; Ex. 2 at 8.

injury.⁴ Dr. Smith ultimately opined that claimant sustained no permanent partial impairment of function as a result of her work-related injury.⁵

Claimant was also referred to Dr. Paul Stein for a surgical consultation. Dr. Stein took a history from claimant and reviewed her recent medical history, including the x-rays and bone scan. His examination revealed normal reflexes, no evidence of spasm but he noted a marked reaction to even a light touch over the skin of her lower back.⁶ He also observed a “give way” or “break-away weakness” in claimant’s feet which Dr. Stein did not believe was true weakness.⁷

Dr. Stein concluded claimant was not a surgical candidate. He further testified that claimant demonstrated nonorganic findings which are usually found in patients with either significant emotional or functional overlays as opposed to real physical injury or in those who are malingering.

In August 2002 the ALJ referred claimant for an independent medical evaluation. According to Dr. Philip Mill’s report, claimant complained of pain in the low back, both legs and her right arm. This pain was described as “sharp, radiating down into the legs, burning in the back with weakness and numbness in the legs.”⁸ She also complained of feeling like she is going to pass out. Her pain level was estimated by her at a constant 10 out of 10. Dr. Mills observed non-physiologic findings along with significant pain behavior.⁹ Claimant’s pain disability index reveals her to be 100 percent disabled in 6 of 7 areas of her life, for a total index of 99%. The results of yet another test show that claimant views herself as one with a severe disability.¹⁰

After performing a variety of diagnostic tests, Dr. Mills concluded claimant is suffering with low back pain but that he was unable to explain the patient’s complaints on a physiologic basis.¹¹ Put simply, he found no medical basis for her subjective complaints in her lower extremities. Moreover, he believed claimant was magnifying her symptoms.

⁴ *Id.* at 11, 13-14; Ex. 2 at 8.

⁵ *Id.* at 11; Ex. 2 at 8.

⁶ Stein Depo. at 7.

⁷ *Id.*

⁸ Mill’s IME dated August 27, 2002 at 2.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.* at 5.

Thus, Dr. Mills concluded claimant was at maximum medical improvement and warranted a finding of 0 percent permanent impairment rating for her work-related injury.

In stark contrast to the opinions of Drs. Mills, Smith and Stein, are the opinions of Dr. Daniel D. Zimmerman, the physician claimant's counsel retained to examine her for purposes of this litigation. Dr. Zimmerman assigned a 10 percent permanent partial impairment to the whole body attributable to the claimant's work-related accident. Dr. Zimmerman testified that he recognized the concerns expressed by Dr. Stein that claimant was magnifying her symptoms. He also agreed that some of her lower extremity findings, specifically the "giving way" is not anatomically explainable by all the diagnostic studies that have been performed.¹² Nonetheless, he believed his rating is "fair and reasonable."¹³

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.¹⁴ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁵

After reviewing the evidence the ALJ concluded the overwhelming disability claimant describes as a result of her accident is simply not borne out by the medical testimony. Three physicians have concluded that while "[c]laimant had some mild degeneration consistent with her age," the symptom magnification identified by no less than 3 of the physicians outweighed the testimony offered by Dr. Zimmerman. This is particularly so when even Dr. Zimmerman recognized - and yet ultimately ignored - the fact that claimant's subjective complaints have no physiological basis. The Board agrees with and adopts the ALJ's findings and conclusions.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated December 23, 2003, is affirmed.

¹² Zimmerman Depo. at 22.

¹³ *Id.*

¹⁴ K.S.A. 44-501(a)(Furse 2000); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

¹⁵ K.S.A. 2001 Supp. 44-508(g); see also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

IT IS SO ORDERED.

Dated this _____ day of June, 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Robert G. Martin, Attorney for Self-Insured Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director